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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 Chris Willing,

5 Plaintiff

6 v.

7 State of Nevada,

8 Defendant

Case No. 2:22-cv-00795-CDS-VCF

Order Denying Plaintiff's Motion for
Summary Judgment and Motions to
Amend Relief, and Granting
Defendant's Motion to Dismiss

[ECF Nos. 13, 14, 18, 21]

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10 Pro se plaintiff Chris Willing bring this action challenging Nevada's "Senate Bill No. 182,"
11 the legislation enacted on March 9, 1951, establishing a commission for the three then-sitting
12 Justices of Nevada's Supreme Court to prepare a complete revision and compilation of the
13 constitution and the laws of Nevada. ECF No. 14 at 7. Willing also filed an omnibus motion for a
14 hearing, for summary judgment in his favor (ECF No. 14), and to amend relief¹ (ECF No. 13).
15 Willing's amended relief is his request that this court determine the constitutionality of Senate
16 Bill No. 182. ECF Nos. 13, 21. The State of Nevada, who has not yet been properly served,
17 nonetheless moves to dismiss this action arguing that Willing fails to state a claim and that he is
18 not entitled to injunctive relief. *See generally* ECF No. 18. Having reviewed the moving papers, I
19 have determined I can rule on these motions on the papers and therefore plaintiff's request for a
20 hearing is denied. *See* Fed. R. Civ. P. 78(b) ("By rule or order, the court may provide for
21 submitting and determining motions on briefs, without oral hearings."). Further, for the reasons
22 set forth herein, I grant the State of Nevada's motion to dismiss without prejudice and I deny
23 plaintiff's motion for summary judgment. Because I am dismissing this action, I deny plaintiff's

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26 ¹ Willing filed two motions to amend relief (ECF Nos. 13, 21). The relief requested in each is the same in both motions. Because I deny his requested relief in regard to the first motion, Willing's second motion to amend relief is also denied.

1 motions to amend relief on the basis set forth in the motions but grant leave to amend pursuant
2 to the instructions in this order.

3 **I. Background**

4 Like several similar suits brought in this district, plaintiff contends that “Senate Bill No.
5 182” is unconstitutional because the 1951 Statute Revision Commission (hereinafter “the
6 Commission”) included three Nevada Supreme Court Justices: Merrill, Badt, and Eather. Willing
7 contends their selection violated (1) the separation of powers doctrine as it constituted an
8 improper delegation of legislative powers to the judiciary (2) the Nevada Constitution’s
9 probation on dual employment, and (3) his due process and equal protection rights. *See generally*
10 *Compl.*, ECF No. 4. Last, Willing alleges that the inclusion of the Justices on the Commission
11 was a violation of the Justices’ Judicial Code of Conduct. *Id.* at 12. As relief, plaintiff seeks to
12 vacate his underlying convictions and sentence, and to be granted time served. *Id.* at 4.

13 **II. Discussion**

14 *a. Willing’s motion for summary judgment is denied.*

15 Summary judgment is appropriate when it is demonstrated that there “is no genuine
16 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Celotex*
17 *Corp. v. Catrett*, 477 U.S. 317, 330 (1986); *see also* Fed. R. Civ. P. 56. A party asserting that a fact
18 cannot be disputed must support the assertion by “citing to particular parts of materials in the
19 record, including depositions, documents, electronically stored information, affidavits or
20 declarations, stipulations (including those made for purposes of the motion only), admissions,
21 interrogatory answers, or other materials . . .” Fed. R. Civ. P. 56(c)(1)(A).

22 An issue is “genuine” if the evidence would permit a reasonable jury to return a verdict
23 for the nonmoving party. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). “[T]he
24 substantive law will identify which facts are material. Only disputes over facts that might affect
25 the outcome of the suit under the governing law will properly preclude the entry of summary
26 judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v.*

1 *Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute is “genuine” only where a reasonable jury could
2 find for the nonmoving party. *Id.* Conclusory statements, speculative opinions, pleading
3 allegations, or other assertions uncorroborated by facts are insufficient to establish a genuine
4 dispute. *Soremekun*, 509 F.3d at 984 (9th Cir. 2007). When considering a motion for summary
5 judgment, the court views all facts and draws all inferences in the light most favorable to the
6 nonmoving party. *Colwell v. Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014).

7 Summary judgment proceeds in a burden-shifting step analysis. The burden starts with
8 the moving party who bears the initial responsibility of informing the court of the basis of its
9 motion, and identifying those portions of the pleadings, depositions, answers to interrogatories,
10 and admissions on file, together with affidavits, if any, and other evidence which it believes
11 demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317,
12 325 (1986). If the moving party meets its initial burden of showing the absence of a material and
13 triable issue of fact, the burden then moves to the opposing party, who must present significant
14 probative evidence tending to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem.*
15 *Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

16 Willing brings this action under 42 U.S.C. § 1983, which provides in relevant part that
17 “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any
18 State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of
19 the United States or other person within the jurisdiction thereof to the deprivation of any rights,
20 privileges, or immunities secured by the Constitution and laws, shall be liable to the party
21 injured in an action at law, suit in equity, or other proper proceeding for redress.” “Section 1983
22 does not create any substantive rights, but rather is a vehicle by which plaintiffs can bring
23 federal constitutional and statutory challenges to actions by state and local officials.” *Anderson v.*
24 *Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006). To prevail on his § 1983 claim, Willing must prove
25 two essential elements: (1) “that a right secured by the Constitution or laws of the United States
26 was violated,” and (2) “that the alleged violation was committed by a person acting under the

1 color of State law.” *Long v. Cty. Of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

2 Liberally construing² Willing’s complaint, he alleges that the inclusion of the three
3 Nevada Supreme Court justices on the Commission violates his due process and equal
4 protection rights under the Fourteenth Amendment. As the moving party, plaintiff fails to meet
5 his initial burden demonstrating, on the basis of authenticated evidence, that the record
6 forecloses the possibility of a reasonable jury finding in favor of the nonmoving party as to
7 disputed material facts. *Celotex*, 477 U.S. at 323. Plaintiff only provides a list, signed by plaintiff,
8 containing conclusory statements regarding what he believes to be constitutional violations, a
9 copy of Senate Bill No. 182, and a copy of Article III of the Nevada Constitution. *See* ECF No. 14
10 at 6. These documents do not prove, by admissible evidence, either essential element of a 1983
11 claim. *See Hernandez v. Spacelabs Medical Inc.*, 343 F.3d 1107, 1112 (9th Cir. 2003) (noting that a party
12 “cannot defeat summary judgment with allegations in the complaint, or with unsupported
13 conjecture or conclusory statements”). For this reason, the court must deny plaintiff’s motion for
14 summary judgment.

15 *b. The State of Nevada’s motion to dismiss for failure to state a claim is granted.*

16 A complaint may be dismissed as a matter of law for failure to state a claim “where there
17 is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable
18 legal theory.” *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (as
19 amended) (citation omitted). In considering whether a complaint states a claim, a court must
20 generally accept as true all the factual allegations in it. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
21 The court need not accept as true, however, “allegations that are merely conclusory,
22 unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d
23 1049, 1055 (9th Cir. 2008) (citation omitted). Further, a complaint need not include detailed
24 factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to

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26 ² “A document filed *pro se* is ‘to be liberally construed,’ and ‘a *pro se* complaint, however inartfully
pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” *Erickson v.*
Pardus, 551 U.S. 89, 94 (2007) (citations omitted).

1 relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550
 2 U.S. 544, 570 (2007)); *Yagman v. Garcetti*, 852 F.3d 859, 863 (9th Cir. 2017). A claim is facially
 3 plausible when it “allows the court to draw the reasonable inference that the defendant is liable
 4 for the misconduct alleged.” *Iqbal*, 556 U.S. at 678.

5 The State of Nevada moves to dismiss this action on two grounds.³ First, the State of
 6 Nevada moves to dismiss this action because the relief sought in the complaint violates the *Heck*
 7 doctrine. As relief, plaintiff requests injunctive relief in the form of vacating his sentence and
 8 being awarded credit for time served. ECF No. 18 at 3-4. I agree with the State of Nevada that a
 9 plaintiff cannot seek this type of relief through a 42 U.S.C. § 1983 action. *Wilkinson v. Dotson*, 544
 10 U.S. 74, 78 (2005) (plaintiff cannot challenge “the fact or duration of his confinement” in a § 1983
 11 claim). In order to vacate his sentence, Willing would have to prove that his conviction or
 12 sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a
 13 state tribunal, or called into question by a federal court’s issuance of a writ of habeas corpus.
 14 *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994). This holding has become known as the “Heck
 15 preclusion doctrine,” the purpose behind which is to avoid expanding opportunities for
 16 collateral attack to convictions and to promote finality and consistency of judicial decisions. *Id.*
 17 at 484-85. “[T]he relevant question is whether success in a subsequent § 1983 suit would
 18 ‘necessarily imply’ or ‘demonstrate’ the invalidity of the earlier conviction or sentence[.]” *Smithart*
 19 *v. Towery*, 79 F.3d 951, 952 (9th Cir. 1996) (quoting *Heck*, 512 U.S. at 487). This action calls into
 20 question the validity of Willing’s prior conviction and sentence, therefore the *Heck* doctrine
 21 applies and this action is barred. Because it is barred by *Heck*, the State of Nevada is entitled to
 22 dismissal of this action.

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 24 ³ The plaintiff filed an opposition to the motion, but it is mostly nonresponsive and fails to provide points
 25 and authorities in support of the conclusions Willing asserts. *See generally* ECF No. 20. Willing is
 26 reminded he is required to comply with the local rules. As relevant here, Willing is reminded that Local
 Rule 7-2(d) states that “[t]he failure of an opposing party to file points and authorities in response to any
 motion, except a motion under Fed. R. Civ. P. 56 or a motion for attorney’s fees, constitutes a consent to
 the granting of the motion.” LR 7-2(d).

1 After defendant filed its motion to dismiss, plaintiff re-filed his motion to amend relief
 2 asking to remove his requested injunctive relief, vacatur of his sentence, and award of credit for
 3 time served. ECF No. 21. Instead, plaintiff's only requested relief is for this court to rule on the
 4 constitutionality of Senate Bill No. 182. Removing the additional requested relief does not negate
 5 the application of the *Heck* doctrine. But even if it somehow did, the state would still be entitled
 6 to dismissal in its favor because the plaintiff cannot demonstrate that the Commission was
 7 unconstitutional because it included the three Justices, and plaintiff's allegations alone of
 8 judicial misconduct are insufficient to maintain this action.

9 The Nevada Supreme Court addressed a similar challenge on the merits to the
 10 Commission in *Taylor v. State*, 472 P.3d 195 (Nev. 2020) (table). There, the Court held that the
 11 Justices sitting on the Commission did not violate a constitutional provision because "the
 12 Legislative Counsel Bureau – which succeeded the statute revision commission – codifies and
 13 classifies" laws "in a logical order, but does not itself exercise the legislative function." *Id.* at *5.
 14 *Taylor* held that the district court did not err in denying Taylor's claim for relief because the
 15 plaintiff failed to show how the Commission "encroached upon the powers of another branch of
 16 government, violating the separation of powers." *Id.* (citing *Comm'n on Ethics v. Hardy*, 212 P.3d
 17 1098, 1103 (2009) ("The purpose of the separation of powers doctrine is to prevent one branch of
 18 government from encroaching on the powers of another branch.")).

19 Willing's action suffers the same deficiency. He repeatedly asserts that the creation of
 20 the Commission was unconstitutional solely because the three Justices were a part of this new
 21 Commission (*see generally* ECF No. 4; Opp., ECF No. 20) but fails to show how the Commission
 22 unconstitutionally encroached upon another branch of government and violated the separation
 23 of powers doctrine. To properly state a claim, Willing must illustrate, if possible, how a right
 24 secured by the Constitution or laws of the United States was violated by the inclusion of
 25 Justices Merrill, Badt, and Eather on the Commission, and that their inclusion "improperly
 26 encroached upon the powers of another branch of government, violating the separation of

1 powers.” *Taylor*, 472 P.3d 195 at 5. Accordingly, the State of Nevada’s motion to dismiss for
2 failure to state a claim is granted without prejudice.

3 Willing moves to amend the relief sought by bringing this action in the complaint, now
4 only seeking a determination on the constitutionality of Senate Bill No. 182. *See* ECF No. 13 at 2;
5 ECF No. 21. His motion to amend on that basis is denied. However, because leave to amend
6 should be “freely given when justice so requires,” Fed. R. Civ. P. 15(a), I grant Willing leave to
7 amend to cure the aforementioned deficiencies in the complaint. Specifically, Willing has leave
8 to amend by alleging additional plausible facts to show that the inclusion of Justices Merrill,
9 Justice Badt, and Justice Eather on the Commission violated a right secured by the Constitution
10 or laws of the United States. I do not give Willing leave to assert new claims.

11 If Willing chooses to file an amended complaint, he is advised that an amended
12 complaint replaces the original complaint, so the amended complaint must be complete in and of
13 itself. This means that the amended complaint must contain all facts and claims and identify all
14 defendants that he intends to sue. Willing must file an amended complaint on the court’s
15 approved prisoner-civil-rights form, and it must be entitled “First Amended Complaint.”
16 Willing must follow the instructions on the form. He need not and should not allege very many
17 facts in the “nature of the case” section of the form. Rather, in each claim, Willing should allege
18 facts sufficient to show what each defendant did that constitutes a violation of 42 U.S.C. § 1983.
19 Re-filing the same allegations with the same exhibits will be insufficient and may be grounds for
20 dismissing this action.

21 **III. Conclusion**

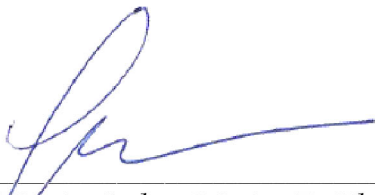
22 IT IS HEREBY ORDERED that defendant’s motion to dismiss [ECF No. 18] is
23 **GRANTED**. Willing’s complaint, ECF No. 4, is dismissed without prejudice.

24 IT IS FURTHER ORDERED that plaintiff’s motions to amend relief [ECF Nos. 13, 21]
25 are **DENIED**.

1 IT IS FURTHER ORDERED that plaintiff's motion for summary judgment [ECF No. 14]
2 is DENIED.

3 If Willing chooses to file an amended complaint, he must do so by May 12, 2023, and
4 follow the instructions in this order.

5 SO ORDERED.

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U.S. District Judge Cristina D. Silva
Dated: April 12, 2023